Supreme Court, U. S.
FILED
APR 5 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1520

ALABAMA HOSPITAL ASSOCIATION, et al.,
Petitioners,

v.

JOSEPH A. CALIFANO, JR., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

M. ROLAND NACHMAN, JR.
P. O. Box 668
Montgomery, Alabama 36101
JOHN P. OLIVER, II
109 Columbus Street
Dadeville, Alabama 36853
Counsel for Petitioners

STEINER, CRUM & BAKER
P. O. Box 668
Montgomery, Alabama 36101
Of Counsel

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

Page

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Statutory and Constitutional Provisions Involved 3

Statement of Case 4

Reasons for Granting the Writ 8

Conclusion 16

Appendix A (Opinions and Judgment of Court of Appeals) A-1

Appendix B (Opinion and Judgment of District Court)... A-5

Appendix C (Stipulation of Parties in District Court) A-13

Citations

Cases:

Arnett v. Kennedy, 416 U.S. 134 8

American Assn. of Councils v. Califano, 575 F.2d 1367, cert. denied 47 U.S.L.W. 3482 .....9, 11, 14

Association of American Medical Colleges v. Califano, 569 F.2d 101 (D.C. Cir. 1977) 11

Bell v. Burson, 402 U.S. 535 8

Brown v. Weinberger, 529 F.2d 514 (4th Cir.) 15

Califano v. Sanders, 430 U.S. 99 .....6, 12

Cervoni v. Secretary of Health, Ed. & Welfare, 581 F. 2d 1010 (1st Cir.) 12, 15

De Lao v. Califano, 560 F.2d 1384 (9th Cir.) 15

Elliott v. Weinberger, 564 F.2d 1219 (9th Cir.), cert. granted, sub. nom. Califano v. Elliott, No. 77-1511..11, 13

Frost v. Weinberger, 515 F.2d 57 (2nd Cir.), cert. denied 424 U.S. 958 15

Goldberg v. Kelly, 397 U.S. 254 8
Goss v. Lopez, 419 U.S. 565 8

Humana of South Carolina v. Mathews, 419 F. Supp. 253 (D.D.C.) 11

In Re LeTourneau, 559 F.2d 892 (2nd Cir.) 15

Johnson v. Robison, 415 U.S. 361 ..... 11, 12, 13
John T. MacDonald Foundation v. Califano, 571 F.2d 328 (5th Cir.), cert. denied — U.S. —, 58 L.Ed.2d 238 6, 9
Joint Anti-Fascist Refugee Com. v. McGrath, 341 U.S. 123 10

Knuckles v. Weinberger, 511 F.2d 1221 (9th Cir.) 15

Martinez v. Richardson, 472 F.2d 1121 (10th Cir.) 15
Mathews v. Eldridge, 424 U.S. 319 8
Mattern v. Mathews, 582 F.2d 248 (3rd Cir.) 15
Memphis Light etc. Div. v. Craft, — U.S. —, 56 L.Ed. 2d 30 8
Morgan v. United States, 304 U.S. 1 8

North Georgia Finishing v. Di-Chem, Inc., 419 U.S. 601 8

Opp Cotton Mills v. Administrator, 312 U.S. 126 8

Ryan v. Shea, 525 F.2d 268 (10th Cir.) 15

St. Joseph Stock Yards v. U.S., 298 U.S. 38 13
St. Louis Univ. etc. v. Blue Cross-Blue Shield, 537 F.2d 283 (8th Cir.) 11

United States ex Rel. Chicago etc. R. Co. v. Interstate Commerce Comm., 294 U.S. 50 ..... 14, 15

Weinberger v. Salfi, 422 U.S. 749 ..... 6, 10, 11
White v. Mathews, 559 F.2d 852 (2nd Cir.), cert. denied 435 U.S. 908 ..... 11, 14
Whitecliff, Inc. v. U.S., 536 F.2d 347 (Ct. Cl.), cert. denied 430 U.S. 969 ..... 6, 9

Wisconsin v. Constantineau, 400 U.S. 433 8
Wolff v. McDonnell, 418 U.S. 539 8
Workman v. Mitchell, 502 F.2d 1201 (9th Cir.) 15

Constitution and Statutes:

United States Constitution, Amendment V 3, 6

5 U.S.C. §§ 701-706 6

28 U.S.C. § 1331(a) 3, 4, 6

28 U.S.C. § 1361 ..... 4, 6, 10, 13

28 U.S.C. § 1406(c) 6, 9

42 U.S.C. § 405(h) 3, 6, 10, 12

42 U.S.C. §§ 1395, et seq. 4, 5

42 U.S.C. § 1395ii 2, 3, 6, 10, 12

28 U.S.C. § 1651 ..... 4, 15

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

Petitioners, Alabama Hospital Association, an organization of approximately 140 hospitals in the State of Alabama, and three named member hospitals operating in Alabama, on their own behalf, and on behalf of all private non-profit, private proprietary, and non-federal governmental hospitals located in Alabama (with one exception), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 12, 1979, as altered and amended on February 26, 1979.

OPINIONS BELOW

The opinions of the Court of Appeals, reported at 587 F.2d 762 and . . . . appear in the Appendix hereto, as does the opinion rendered by the District Court for the Middle District of Alabama on August 23, 1976.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 12, 1979. In response to a timely motion to alter or amend this judgment, that court on February 26, 1979 deleted a portion of it and substituted the provisions sought by Petitioners. This petition for certiorari was filed within ninety (90) days of both dates. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Department of Health, Education and Welfare, and its fiscal intermediary, Blue Cross, took or recouped from Alabama Hospitals $657,000 after a unilateral determination—without a hearing before, during or after it—that these sums had been paid as reimbursement under the Medicare Act for unnecessary medical services. The District Court held that these administrative acts and omissions deprived these Alabama Hospitals of their property without due process of law. The Court of Appeals held that the District Court had no subject matter jurisdiction, and that Congress in 42 U.S.C. § 1395ii had precluded all federal judicial remedies for this unconstitutional deprivation of property.

The questions presented are:

1. Does this statute strip the federal courts of all subject matter jurisdiction to decide such a constitutional question?

2. If so, does this statute violate the due process clause of Amendment V of the Constitution of the United States?

3. Even if this statute precludes the exercise of subject matter jurisdiction by the federal courts under 28 U.S.C. § 1331(a), is there jurisdiction to hear and decide such a constitutional claim to procedural due process under the mandamus statute, 28 U.S.C. § 1361?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person shall be * * * deprived of * * * property, without due process of law * * *."

42 U.S.C. § 1395ii:

> "The provisions . . . of subsection . . . (h) . . . of section 405 of this title, shall also apply with respect to this subchapter to the same extent as they are applicable with respect to subchapter II of this chapter."

42 U.S.C. § 405(h):

> "(h) The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter."

28 U.S.C. § 1331(a):

> "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

28 U.S.C. § 1361:

> "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

28 U.S.C. § 1651:

> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usage and principles of law.
>
> "(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

Generally, 42 U.S.C. § 1395, et seq. "Medicare Act."[1]

STATEMENT OF CASE

Petitioners, plaintiffs in the district court (hereafter "Alabama Hospitals"), on December 20, 1974, sued on their own behalf, and on behalf of all private non-profit, private proprietary, and non-federal governmental hospitals located in Alabama (with the exception of one hospital). It was stipulated that the action was properly maintainable and could proceed as a class

[1] The entire "Medicare Act" has not been reproduced.

action pursuant to Rule 23, F.R.C.P. on behalf of all such affected hospitals located and operating in Alabama; and that Petitioners were proper representatives to maintain this class action.

Respondents, defendants in the district court, are the Secretary of the Department of Health, Education and Welfare and Blue Cross-Blue Shield of Alabama (hereafter collectively "HEW").

Pursuant to the Medicare Act[2], Alabama Hospitals, having agreed with HEW to become providers of medical services for beneficiaries of the Medicare program, looked to HEW for payment through HEW's designated Alabama "fiscal intermediary", respondent Blue Cross-Blue Shield.

Under the statutory plan, HEW may question the coverage of services provided by hospitals, and the cost of such services. Non-covered services and charges which exceed "reasonable costs" are not reimbursable. No question of cost, however, is involved in the case at bar.

Alabama hospitals, between 1967-1972, received approximately $657,000 in Medicare funds to which HEW had determined they were entitled. This dispute arose because subsequently, by ex parte proceedings without any evidentiary hearing or review—*either before or after a unilateral determination*—HEW found that these funds were overpayments for unnecessary medical services; and thereupon HEW took away these funds from Alabama Hospitals under duress by forcing repayment or by withholding future funds admittedly due Alabama Hospitals.[3]

[2] 42 U.S.C. §§ 1395, et seq.

[3] In the words of the court below (587 F.2d at 763):

> "The lawsuit arose out of HEW's recoupment of reimbursement funds paid to provider hospitals for medical services that Blue Cross, plaintiffs' fiscal intermediary, unilaterally determined

The district court, on August 23, 1976, held that this governmental taking, without affording the provider hospitals a hearing *at some point*, violated procedural due process guaranties of the Fifth Amendment of the United States Constitution. The district court, moreover, ordered that HEW "pay to [Alabama Hospitals] the disputed amounts or . . . undertake evidentiary hearings within a reasonable time."[4]

The court below, concluding that the district court had acted without subject matter jurisdiction, vacated its decision; dismissed HEW's appeal; and transferred the cause to the Court of Claims pursuant to 28 U.S.C. § 1406(c). The court below held that there was no federal subject matter jurisdiction under the Administrative Procedure Act[5] or under 28 U.S.C. § 1331(a).[6] It was silent on the assertion that subject matter jurisdiction was also conferred by the mandamus statute, 28 U.S.C. § 1361.

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were unnecessary. The plaintiffs contend that they were constitutionally entitled to a hearing at some point during or after the recoupment process. The district court agreed."

[4] Appendix, p. A-10.

[5] 5 U.S.C. §§ 701-706. The court below relied on *Califano v. Sanders*, 430 U.S. 99.

[6] The court relied on its decision in *John T. MacDonald Foundation v. Califano*, 571 F.2d 328 (5th Cir.) cert. denied, — U.S. —, 58 L.Ed2d 238 (1978). This *MacDonald* decision was the culmination of a trilogy. The coutr below in 534 F.2d 633 held that there was jurisdiction under the Administrative Procedure Act; on rehearing, 554 F.2d 714, it held that there was not, but that there was subject matter jurisdiction under 28 U.S.C. § 1331(a). After rehearing *en banc*, 571 F.2d 328, the court below held that there was no subject matter jurisdiction under either statute—because of 42 U.S.C. 405(h) as interpreted in *Weinberger v. Salfi*, 422 U.S. 749, and incorporated into 42 U.S.C. § 1395ii—and transferred the case to the Court of Claims because that court had held that there was jurisdiction. *Whitecliff, Inc. v. U.S.*, 536 F.2d 347 (Ct. Cl. 1976), cert. denied 430 U.S. 969.

All relevant facts are stipulated.[7] Alabama Hospitals provided medical services during the period 1967-1972 for which they sought and received reimbursement from HEW. Blue Cross, after fiscal review and audit, determined that there had been an overpayment to those hospitals, in the amounts specified in the stipulation, because of over utilization of hospital services by patients in these hospitals. Patient files were reviewed by registered nurse employees of the fiscal intermediary and its medical consultants; and the fiscal intermediary made a unilateral determination of whether all or any part of a hospital stay was or was not reasonable and necessary. To the extent that the fiscal intermediary determined that payments, as reimbursement for hospital care, had been made to these hospitals for services thus determined to be unnecessary, the fiscal intermediary sought repayment of those amounts. As an alternative to repayment by these hospitals, HEW asserted the right of recoupment against future requests for reimbursement for future services. The total sum thus taken from Alabama Hospitals by this method was stipulated to be $656,571.18.

In the conduct of fiscal review of Alabama Hospitals and audit procedures, HEW took the position that it could decide unilaterally without evidentiary hearing or review—either before or after determining that these hospitals had received medicare reimbursement to which they were not entitled. HEW only furnished to these hospitals the names of those patients who were deemed to have been unnecessarily treated or to have been the recipients of noncovered services.[8]

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[7] The stipulation is appended hereto as Appendix C.

[8] It was stipulated (App. C):

"Notwithstanding requests by these class members for hearing or review of these adverse determinations of defendants, the determinations were made unilaterally by defendants; defendants did not grant hearings or review procedures in connection with or after adverse determinations of over payment to these class members, and the assertion of the right to recoupment or offset

REASONS FOR GRANTING THE WRIT

HEW took approximately $657,000 from Alabama Hospitals after a unilateral, exparte determination of over payment for non-covered services. HEW's procedure violated basic principles of due process which require an evidentiary hearing *at some point* in administrative proceedings—a hearing which is fair, before an impartial tribunal, with opportunity to present evidence, to know the claims of the opposing party and to meet them. Due process secures a right to such a hearing, either before or after a final determination of non-covered services, and a right to subsequent judicial review. *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 152-153; *Morgan v. United States*, 304 U.S. 1, 18-19; *Goldberg v. Kelly*, 397 U.S. 254, 267-8; *Mathews v. Eldridge*, 424 U.S. 319, 323-333.[9]

The district court correctly held that Alabama Hospitals were denied due process when their funds were taken or recouped without any evidentiary hearing or review at any point in the administrative proceedings.

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from or against them. Defendants took the position that such unilateral determinations of over payments, without opportunity for hearing or review, were contemplated under and by the Medicare Act; and, moreover, that there was no provision in the Medicare Act or regulations promulgated thereunder for hearing or review prior to or after an administrative determination of over payment and of a right to recoupment and offset."

[9] In recent years this Court's decisions have required hearings in varied contexts:—*Memphis Light etc. Div. v. Craft*, — U.S. —, 56 L.Ed2d 30 (termination of utility service); *Goss v. Lopez*, 419 U.S. 565 (suspension of student from public high school); *North Georgia Finishing v. Di-Chem, Inc.*, 419 U.S. 601 (garnishment of bank account); *Arnett v. Kennedy*, 416 U.S. 134 (discharge from public office); *Wolff v. McDonnell*, 418 U.S. 539 (prison disciplinary proceedings); *Bell v. Burson*, 402 U.S. 535 (suspension of a driver's license); and *Wisconsin v. Constantineau*, 400 U.S. 433 (government labeling of a person as an "excessive drinker").

The court below did not disagree with the district court's decision. It held, however, that the district court had no jurisdiction to secure to Alabama Hospitals their constitutional guaranty of procedural due process; and that there is no judicial remedy in any federal court for these persons whose property has been taken without a semblance of procedural due process, and by patently unconstitutional means. It did so on the basis of its earlier decisions in *John T. MacDonald Foundation*, 571 F.2d 328 (5th Cir.), cert. denied, —U.S. —, 58 L.Ed.2d 238 (1978), and *American Association of Councils v. Califano*, 575 F.2d 1367, cert. denied 47 U.S.L.W. 3482. Its reasons were (587 F.2d 762, 763):

> "*MacDonald* involved a challenge by a provider of Medicare services to HEW's method of determining reimbursable cost. On the basis of *Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), this court concluded that the incorporation of 42 U.S.C. §405 (h) into the Medicare Act through 42 U.S.C. § 1395ii, eliminated subject matter jurisdiction under 28 U.S.C. § 1331(a) to review the validity of HEW's reimbursement procedures. That decision controls this case."

The court below recognized the enormous impact of its decisions that a statute of Congress precluded all judicial review in the federal courts of an alleged denial of procedural due process. Because the Court of Claims in *Whitecliff, Inc. v. U.S.*, 536 F.2d 347 (Ct. Cl. 1976), cert. denied 430 U.S. 969 (1977) had held that the same Congressional statute did *not* preclude its jurisdiction to consider and decide such a constitutional claim, the *en banc MacDonld* decision—as the case at bar—sought to avoid the serious constitutional implications by transferring the case to the Court of Claims under 28 U.S.C. § 1406(c):

> "Happily, we need resolve neither Congress' intent to preclude review of constitutional claims nor the constitu-

tionality of a statute so construed. We would face these isues only if *all* avenues of review were precluded." (571 F.2d at 332; emphasis by the court.)

The question of non-reviewable executive decisions—as pervasive and intrusive as those under the Medicare Act—even decisions made without a semblance of procedural due process—cannot be so lightly avoided. The impact of the judgment below is grave. The issues are momentous and call urgently for the consideration and determination of this Court. The decision below, if it stands, will severely undermine transcendant guaranties of fairness[10] and our traditional system of checks and balances. Moreover, the decision below—which precludes all federal jurisdiction to hear and decide due process claims—conflicts with the holdings of numerous circuits, including the Fifth, that there is mandamus jurisdiction under 28 U.S.C. § 1361.

I

The court below rejected arguments which could have avoided its holding that 42 U.S.C. § 405(h)—as interpreted in *Weinberger v. Salfi*, 422 U.S. 749, and, as thus interpreted, incorporated by reference into 42 U.S.C. § 1395ii—precluded any federal court anywhere from deciding a claim arising under the Constitution of the United States that a person's property had been taken without a semblance of procedural due process. It rejected arguments:

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[10] Justice Frankfurter has eloquently described "due process" as a "profound attitude of fairness between man and man, and more particularly between the individual and government. * * * Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process." *Joint Anti-Fascist Refugee Com. v. McGrath*, 341 U.S. 123, 162-163.

(a) that such a claim arises, not under the Medicare Act within the meaning of §405(h), but under the Constitution itself;[11]

(b) that there is a clear distinction between federal question jurisdiction of an asserted denial of procedural due process; and a challenge to an administrative decision on the merits, even one which asserts an absence of substantive due process;[12]

(c) that § 405(h) is no bar because under its plain wording it applies only when "findings and decisions" of the Secretary have come "after a hearing . . ."[13]

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[11] That court read *Weinberger v. Salfi*, 422 U.S. 749, as precluding all federal court review of either "statutory" or "constitutional" claims. *American Assn. of Councils v. Califano*, 575 F.2d 1367, 1372. (5th Cir. 1978)

[12] *White v. Mathews*, 559 F.2d 852, 856, cert. denied 435 U.S. 908; *Association of American Medical Colleges v. Califano*, 569 F. 2d 101, 114 (D.C. Cir. 1977); *St. Louis Univ. etc. v. Blue Cross-Blue Shield*, 537 F.2d 283, 291-293. But cf. *Johnson v. Robison*, 415 U.S. 361, 367, discussed *infra*.

[13] Although the money of Alabama Hospitals has been taken without a hearing, the court below dismissed this distinction (587 F.2d at 763):

> "The plaintiffs argue that *MacDonald* can be distinguished because § 405(h)'s bar to jurisdiction applies only to appeals from findings and decisions of the Secretary, and here the plaintiffs sued because HEW held no hearing. But this court decided in *American Association of Councils of Medical Staffs v. Califano, supra* at 1372, that the lack of an 'administrative hearing or decision . . . does not serve as a relevant distinction from *MacDonald*.' Id. at 1372; accord, *Trinity Memorial Hospital v. Associated Hospital Services*, 570 F.2d 660, 667 (CA7, 1977)."

Compare, however, *Humana of South Carolina v. Mathews*, 419 F. Supp. 253 (D.D.C. 1976); *American Assn. of Councils of Medical Staffs v. Califano*, 575 F.2d 1367, 1371, n. 1 (1978); *Elliott v. Weinberger*, 564 F.2d 1219, 1227 (9th Cir. 1977), cert. granted, *sub nom Califano v. Elliott*, No. 77-1511.

Accordingly, the court below has now held that Congress, by §§ 405(h) and 1395ii, precluded all judicial review of administrative denials of procedural due process. It has thus presented this Court with a constitutional question of the first magnitude—" 'one that has arisen but rarely and tangentially in our constitutional history, i.e. whether the Congress can close the federal courts entirely to constitutional challenges directed against federal statutes or action.' "[14]

The decision below answers this grave question in a manner which squarely conflicts with this Court's holding in *Califano v. Sanders*, 430 U.S. 99, 109:

> "Thus those cases [Salfi and Mathews v. Eldridge, 424 U.S. 319] merely adhered to the well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by 'clear and convincing' evidence." [Citing *Salfi* and *Johnson v. Robison*, 415 U.S. 361, 366-367.]

The decision below conflicts also with this Court's holding in *Johnson v. Robison*, 415 U.S. 361, 366-367:

> "We consider first appellants' contention that § 211(a) bars federal courts from deciding the constitutionality of veterans' benefits legislation. Such a construction would, of course, raise serious questions concerning the constitutionality of § 211(a), and in such case it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question[s] may be avoided."

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[14] *Cervoni v. Secretary of Health, Ed. and Welfare*, 581 F.2d 1010, 1016-1017 (1st Cir. 1978).

One of the precedents which this Court cited in *Johnson v. Robison* to exemplify the gravity of such preclusion is the classic concurrence of Justice Brandeis in *St. Joseph Stock Yards v. U.S.*, 298 U.S. 38, 84:

> "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality."

Surely this is not the time in our history when it would serve the values enshrined in our Constitution for this Court to let stand a decision by any Court of Appeals of the United States that Congress may preclude all federal courts from deciding whether an enormous and pervasive federal department may take the property of our citizens without affording due process of law.[15]

II

The decision below, at least *sub silentio*, is in conflict with numerous decisions of other Courts of Appeals that federal courts may exercise their mandamus jurisdiction under 28 U.S.C. § 1361 to hear and decide constitutional claims such as the one at bar—claims which conform, of course, to the traditional bounds of mandamus. The court held in *Elliott v. Weinberger*, 564 F.2d 1219, 1226 (9th Cir. 1977)[16], commenting on the availability of mandamus jurisdiction:

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[15] Even the Solicitor General, in the Government's brief in *Califano v. Elliott*, No. 77-1511—a case argued orally on March 19, 1979—was compelled to note "the courts' uneasiness with any statutory scheme that threatens to preclude judicial review of constitutional challenges." (p. 63, n. 44)

[16] Cert. granted *sub. nom. Califano v. Elliott*.

> "It is a strict fifth amendment issue, and the question of discretion does not arise. The Secretary has either met his constitutional duty to provide a certain minimum, or he has not. He has no discretion to provide less than that constitutionally required."

As the court put it in *White v. Mathews*, 559 F.2d 853, 856 (2nd Cir. 1977) cert. denied *sub. nom. Califano v. White*, 435 U.S. 908:

> "The Secretary argues that mandamus is inappropriate because the timing of a hearing rests in his decretion. But the scope of the Secretary's discretion is the very issue before us, since we do not believe that he has discretion to deny a reasonable opportunity for a hearing."

These circuits and those in the decisions cited *infra*, p. 15 followed this Court's long standing teaching in *United States ex rel. Chicago, etc. R. Co. v. Interstate Commerce Commission*, 294 U.S. 50, 60-61:

> "Whether an administrative tribunal refuses to hear, or upon a hearing determines that as a matter of law it lacks power to act, it is either correct in its conclusion or incorrect, and the question is whether, if it errs in refusing to act, it is compellable by mandamus to proceed.
> "If beyond peradventure the Act does not confer upon the Commission the power invoked by a complainant, the writ will not be granted. If on the other hand power and authority are plainly found in the Act, and the Commission erroneously refuses to exercise such power and authority, mandamus is the appropriate remedy to compel that body to proceed and to hear the case upon the merits."

The decision below conflicts with that court's earlier one of *American Assn. of Councils of Medical Staffs v. Califano*, 575 F.2d 1367, 1373, cert. denied 47 U.S.L.W. 3482:

> "We do not exclude the possibility of plaintiff's counsel casting an action in terms of mandamus that might resolve what is obviously an important issue to the private hospitals in this country."

The decision conflicts as well with the following decisions of several circuits: *Mattern v. Mathews*, 582 F.2d 248, 253 (3rd Cir. 1978); *Cervoni v. Secretary of Health, Ed. and Welfare*, 581 F.2d 1010, 1019 (1st Cir. 1978); *De Lao v. Califano*, 560 F.2d 1384, 1388 (9th Cir. 1977); *Ryan v. Shea*, 525 F.2d 268, 271-272 (10th Cir. 1975); *Frost v. Weinberger*, 515 F.2d 57, 61-62 (2nd Cir. 1975), cert. denied 424 U.S. 958 (1976); *Brown v. Weinberger*, 529 F.2d 514 (4th Cir. 1975); *Knuckles v. Weinberger*, 511 F.2d 1221, 1222 (9th Cir. 1975); *Workman v. Mitchell*, 502 F.2d 1201, 1205-06 (9th Cir. 1974); *Martinez v. Richardson*, 472 F.2d 1121, 1125-26 (10th Cir. 1973).

Mandamus is clearly available within the jurisdictional averments of the complaint in the case at bar, which cited 28 U.S.C. § 1651, and which sought mandatory relief. *U.S. ex rel. Chicago etc. R. Co. v. I.C.C.*, 294 U.S. 50, 60-61; and *In Re LeTourneau*, 559 F.2d 892 (2nd Cir. 1977).

III

Finally, the decision below is surely incorrect in holding that any federal statute wholly precluded the district court from deciding on the facts stipulated in this case that HEW, through its secretary and its fiscal intermediary, Blue Cross-Blue Shield, had denied Alabama Hospitals procedural due process by taking from them $657,000 of their money without the semblance of a hearing before or after the final decision to take. The implications of that erroneous decision—that Congress had thus assaulted our constitutional system—call for the judgment of this Court. The time for this Court's review is at hand.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

M. ROLAND NACHMAN, JR.
P. O. Box 668
Montgomery, Alabama 36101

JOHN P. OLIVER, II
109 Columbus Street
Dadeville, Alabama 36853

Attorneys for Petitioner

STEINER, CRUM & BAKER
P. O. Box 668
Montgomery, Alabama 36101

Of Counsel

APPENDIX

APPENDIX A

Opinions and Judgment of the
U.S. Court of Appeals for the Fifth Circuit

Alabama Hospital Association, a Non-Profit Corporation, et al., Plaintiffs-Appellees Cross-Appellants,

v.

Joseph Califano, Jr., Secretary of Health, Education and Welfare of the United States, et al., Defendants-Appellants Cross-Appellees.

No. 76-4076

United States Court of Appeals, Fifth Circuit

January 12, 1979

Appeals from the United States District Court for the Middle District of Alabama.

Before Wisdom, Godbold and Tjoflat, Circuit Judges.

Per Curiam:

Alabama Hospital Association, an organization representing 140 Alabama hospitals, and the Tallapoosa County Hospital Board, as representatives of all private proprietary nonprofit and non-federal governmental hospitals located within Alabama, sued the Secretary of Health, Education and Welfare (HEW) and Blue Cross and Blue Shield of Alabama for alleged violations of the Due Process clause of the Fifth Amendment. The lawsuit arose out of HEW's recoupment of reimbursement funds paid to provider hospitals for medical services that Blue Cross, plaintiffs' fiscal intermediary, unilaterally determined were unnecessary. The plaintiffs contend that they

were constitutionally entitled to a hearing at some point during or after the recoupment process. The district court agreed. Jurisdiction to hear the case was based on 5 U.S.C. §§ 701-706 and 28 U.S.C. § 1331(a). We conclude that the district court acted without subject matter jurisdiction and we vacate its decision.

[1, 2] There was clearly no jurisdiction under 5 U.S.C. §§ 701-706, better known as § 10 of the Administrative Procedure Act. *Califano v. Sanders*, 430 U.S. 99, 107, 97 S.Ct. 980, 985, 51 L.Ed.2d 192, 200-01 (1977). Nor under this court's decisions in *Dr. John T. MacDonald Foundation v. Califano*, 571 F.2d 328 (CA5) (en banc), *cert. denied*, — U.S. —, 99 S.Ct. 250, 58 L.Ed.2d 238 (1978), and *American Association of Councils of Medical Staffs v. Califano*, 575 F. 2d 1367 (CA5), *pet. for cert. filed*, 47 U.S.L.W. 3267 (U.S. Oct. 3, 1978), was there jurisdiction under 28 U.S.C. § 1331(a).

MacDonald involved a challenge by a provider of Medicare services to HEW's method of determining reimbursable cost. On the basis of *Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), this court concluded that the incorporation of 42 U.S.C. § 405(h) into the Medicare Act through 42 U.S.C. § 1395ii, eliminated subject matter jurisdiction under 28 U.S.C. § 1331(a) to review the validity of HEW's reimbursement procedures. That decision controls this case. The plaintiffs argue that *MacDonald* can be distinguished because § 405(h)'s bar to jurisdiction applies only to appeals from findings and decisions of the Secretary, and here the plaintiffs sued because HEW held no hearing. But this court decided in *American Association of Councils of Medical Staffs v. Califano, supra* at 1372, that the lack of an "administrative hearing or decision . . . does not serve as a relevant distinction from *MacDonald*." *Id.* at 1372; *accord, Trinity Memorial Hospital v. Associated Hospital Services*, 570 F.2d 660, 667 (CA7, 1977).

[3] We have held that Medicare plaintiffs whose claims are barred by § 405(h) may go to the Court of Claims. *American Association of Councils of Medical Staffs v. Califano, supra* at 1373; *Dr. John T. MacDonald Foundation v. Califano, supra* at 332.[1] The Court of Claims does not have the power to grant the plaintiffs' request for declaratory and injunctive relief, but it can decide the issue raised by the plaintiffs because they have requested damages. *See American Association of Councils of Medical Staffs v. Califano, supra* at 1373.

VACATED and REMANDED to the district court for dismissal without prejudice to the plaintiffs to file other appropriate proceedings.

Alabama Hospital Association, a Non-Profit Corporation, et al., Plaintiffs-Appellees, Cross-Appellants,

v.

Joseph A. Califano, Jr., Secretary of Health, Education and Welfare of the United States, et al., Defendants-Appellants, Cross-Appellees

No. 76-4076

United States Court of Appeals, Fifth Circuit

February 26, 1979

Appeals from the United States District Court for the Middle District of Alabama; Frank M. Johnson, Jr., Chief Judge.

Before Wisdom, Godbold and Tjoflat, Circuit Judges.

By the Court:

IT IS ORDERED that appellee's motion to alter or amend judgment is GRANTED. The last paragraph of our opinion

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[1] The Court of Claims held in *Whitecliff, Inc. v. U. S.*, 536 F.2d 347 (Ct.Cl.1976), *cert. denied*, 430 U.S. 969, 97 S.Ct. 1652, 52 L. Ed.2d 361 (1977), that its jurisdiction was not affected by § 405(h).

filed January 12, 1979, is deleted and in lieu thereof the following is substituted:

> Pursuant to 28 U.S.C. § 1406(c), the appeal is DISMISSED and the cause is TRANSFERRED to the Court of Claims. *See Dr. John T. MacDonald Foundation v. Califano*, 571 F.2d 328 (CA5) (en banc), *cert. denied*, — U.S. —, 99 S.Ct. 250, 58 L.Ed.2d 238 (1978).

APPENDIX B

Opinion and Judgment of the U.S. District Court for the Middle District of Alabama

In the United States District Court for the Middle District of Alabama, Northern Division

Alabama Hospital Association, a Nonprofit Corporation; and Tallapoosa County Hospital Board, Inc. (operating East Tallapoosa Hospital), a Public Corporation, Plaintiffs, v. F. David Mathews, as Secretary of Health, Education and Welfare of the United States; and Blue Cross and Blue Shield of Alabama, a nonprofit corporation, Defendants.	Civil Action No. 74-394-N

MEMORANDUM OPINION

(Filed August 23, 1975)

In this class action, plaintiffs seek declaratory and injunctive relief, and damages for deprivation of their right to due process under the Fifth Amendment. Jurisdiction in this matter is pursuant to 28 U.S.C. §§ 1331(a), 2201, and 2202 and 5 U.S.C. §§ 701-706.

By joint motion of the parties, the case is being submitted to the Court for decision on the basis of the briefs and the evi-

dence presented by stipulations, affidavits, answers to interrogatories and other documents of the parties.

Plaintiffs are the Alabama Hospital Association, an organization comprised of approximately 140 hospitals in the State of Alabama, and the Tallapoosa County Hospital Board, Inc., which operates a hospital in Dadeville, Alabama. Plaintiff Tallapoosa County Hospital Board sues on its own behalf, and each plaintiff sues on behalf of all private non-profit, private proprietary, and non-federal governmental hospitals located in Alabama with the exception of the Hospital Association of Conecuh County.

Defendants are F. David Mathews, the Secretary of the Department of Health, Education and Welfare (hereinafter HEW), and Blue Cross and Blue Shield of Alabama (hereinafter Blue Cross). The Department of Health, Education and Welfare is charged with the administration of the Medicare Act, which is the subject of this dispute. It has delegated certain of its responsibilities to Blue Cross.

Under the "Medicare Act,"[1] a hospital may enter into an agreement with HEW to become a provider of medical services ("provider") for beneficiaries of the Medicare program. When the hospital provides the services, then it looks to HEW for payment. In this case, all of HEW'S financial dealings with the plaintiff hospitals were through a "fiscal intermediary," defendant Blue Cross. In the performing of its function, Blue Cross conducted an audit and review of past reimbursements made to providers in Alabama, and determined that some reimbursements had been made for medically unnecessary services. This determination was made on a unilateral basis. As a result, defendants demanded that the alleged overpayments be returned to them, and threatened to withhold future payments if they were not. Under this pressure, some providers repaid the money, while

[1] 42 U.S.C. §§ 1395, *et seq.*

others had admittedly due payments withheld. The total amount in dispute is $656,571.18.[2]

The "Medicare" Act incorporates several provisions of the Social Security Act.[3] One of these incorporated provisions, Section 405(h), states that "No findings of fact or decisions of the Secretary [of HEW] shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under [§§ 1331, *et seq.*] of Title 28 to recover on any claim arising under this subchapter."[4] The Social Security Act provides procedures for review,[5] including judicial review, and the Medicare Act grants dissatisfied beneficiaries the right to a hearing and judicial review.[6] However, at no time relevant to this case was there any specific provision which gave hospitals, such as plaintiffs, the right to review. Defendants therefore maintain that, in the absence of such a provision, the specific prohibition of Section 405(h) deprives this Court of jurisdiction to hear the case, even though this would leave plaintiffs without a judicial remedy.

Defendants rely principally on the Supreme Court decision in *Weinberger v. Salfi*, 422 U.S. 749 (1975). That case involved a challenge to a Social Security requirement brought under the jurisdiction of Section 1331. The Court said that Section 405(h) barred the district court from taking jurisdiction

[2] The parties have stipulated the amount in dispute with regard to each member of the plaintiff class.

[3] Subsections (a), (d), (e), (f), (h), (i), (j), (k), and (l) of 42 U.S.C. § 405 are incorporated into the "Medicare" Act by 42 U.S.C. § 1395(ii).

[4] 42 U.S.C. § 405(h).

[5] 42 U.S.C. § 405(b) and (g).

[6] 42 U.S.C. § 1395(ff).

in the case. However, the Supreme Court emphasized that the act had provided the plaintiff with another procedure to raise his challenge, and thus that judicial review was not precluded. In fact, the Court said "clear and convincing" evidence of congressional intent would be required before a statute would be construed to eliminate judicial review. And in the present case, defendants' interpretation would eliminate judicial review.

To find that plaintiffs are without a judicial remedy would indeed raise serious constitutional problems.[7] Two Second Circuit decisions, announced before *Weinberger v. Salfi, supra,* held that this was not Congress's intent. *Kingsbrook Jewish Medical Center v. Richardson,* 486 F.2d 663 (2d Cir. 1973); and *Aquavella v. Richardson,* 437 F.2d 397 (2d Cir. 1971), involved suits by providers against HEW. These decisions said that the bar to district court jurisdiction contained in Section 405(h) only applied where, as in Social Security cases, there was some other type of remedy. As there were no other remedies, Medicare providers were permitted to proceed under 28 U.S.C. § 1331.

This question has now been settled in the Fifth Circuit. *Dr. John T. MacDonald Foundation, Inc. v. Mathews,* No. 75-2966 (5th Cir., May 12, 1976) (slip opinion), which was decided after *Weinberger v. Salfi, supra,* declined to apply that decision to a situation where a provider hospital had no other opportunity for judicial review. The Court stated, "The law of this circuit, then, is that § 405(h) is not an absolute bar to jurisdiction under the APA to review refusals of the Secretary to reopen decisions otherwise unreviewable." Thus, the jurisdiction of this Court to hear a constitutional challenge to the defendants' actions is clear.

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[7] *See Johnson v. Robinson,* 415 U.S. 361 (1974); and Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic,* 66 Harv. L. Rev. 1362.

The defendants had a right, in the present case, to withhold payment to the hospitals in order to recover the overpayments made in the past. The Fifth Circuit has held that "the government's common law right to recoup is available to HEW in its implementation of the Medicare hospital insurance program to recover from providers funds paid for medically unnecessary services." *Mount Sinai Hospital of Greater Miami, Inc. v. Weinberger,* 517 F.2d 329 (5th Cir. 1975).

The remaining issue is whether the Due Process Clause of the Fifth Amendment requires that provider hospitals be given a hearing, at least after a recoupment. *Coral Gables Convalescent Home, Inc. v. Richardson,* 340 F. Supp. 646 (S.D. Fla. 1972) has held that this is indeed necessary. And defendants have conceded that in disputes with HEW, the providers have a right to a hearing. Defendants' principal contention is based on the fact that the hospitals may still charge their patients for any services that the Medicare program does not pay. As a result, the defendants argue, the only people suffering any real loss are the patients, and the hospitals cannot assert the patients' rights for them. According to this theory, plaintiffs have no property interest for the Fifth Amendment to protect and thus they have no standing.

Under *Board of Regents v. Roth,* 408 U.S. 564 (1972), a plaintiff must have a substantial property interest (if he has no life or liberty interest) in order to invoke the protection of Due Process.[8] However, obtaining payment from the defendants rather than having to try to collect from numerous individuals of uncertain location and financial condition, many of whom may in fact be dead, is a substantial interest. *Langhorne Gardens, Inc. v. Weinberger,* 371 F. Supp. 1216 (E.D. Penn. 1974). The court in *Langhorne Gardens* said that it could not "characterize as *de minimus* the substitution of individual medicare pa-

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[8] In *Roth,* the Fourteenth Amendment was involved.

tients for the Federal Government as financial obligor for medical services rendered." It further stated that the hospital had "a substantial interest in perfecting its claims against the Government." The district court in *Coral Gables Convalescent Home, Inc. v. Richardson, supra*, though not confronted with the *de minimus* argument presented here, did hold that due process required a hearing upon request for a provider hospital claiming money from the Medicare program. In that case, as in the present one, HEW claimed that the hospital had been overpaid and deducted these amounts from later payments.

As the Court finds that the hospitals are asserting a substantial property interest of their own, defendants' lack of standing argument necessarily fails. Defendants further argue that all sums paid back by the hospitals, under threat of HEW's withholding future funds, were voluntarily paid. This contention is without merit. See *Robertson v. Frank Bros.*, 132 U.S. 17 (1889); *Swift Co. v. United States*, 111 U. S. 22 (1883).

This Court now concludes that defendants' exercise of their right of recoupment without giving the provider hospitals a hearing at some point was a violation of procedural due process. Therefore it will be necessary for defendants either to pay to the plaintiffs the disputed amounts or to undertake evidentiary hearings within a reasonable time.

An order will be entered accordingly.

Done, this the 23rd day of August, 1976.

/s/ (Illegible)
United States District Judge

In the United States District Court for the Middle District of Alabama, Northern Division

Alabama Hospital Association, a Nonprofit Corporation; and Tallapoosa County Hospital Board, Inc. (operating East Tallapoosa Hospital), a Public Corporation, Plaintiffs, v. F. David Mathews, as Secretary of Health, Education and Welfare of the United States; and Blue Cross and Blue Shield of Alabama, a nonprofit corporation, Defendants.	Civil Action No. 74-394-N

JUDGMENT

(Filed August 23, 1976)

Pursuant to the findings of fact and conclusions of law set forth in the memorandum opinion made and entered in this case this date, it is the ORDER, JUDGMENT and DECREE of this Court that:

1. Judgment be and is hereby entered in favor of the plaintiffs.

2. Defendants F. David Mathews and Blue Cross and Blue Shield of Alabama be ENJOINED from failing to either (a) repay any and all sums recouped in this case [in accord with the stipulations of the parties]; or (b) institute evidentiary hearings within a reasonable time to determine the propriety of defendants' recouping any and all funds not repaid to plaintiffs.

3. Defendants shall notify the Court and plaintiffs within 30 days whether or not they intend to pay plaintiffs any of the disputed sums. If they give notice of an intention to pay any of said sums, then they shall pay within 60 days thereafter.

4. Should defendants give notice of an intention to conduct evidentiary hearings, then all parties shall submit to the Court within 90 days any and all objections to the evidentiary hearings being conducted according to the rules, standards, and procedures set out in 42 U.S.C. § 1395 (oo) and to said hearings being conducted before the Provider Reimbursement Review Board established by that section. If no objections are filed, then any hearings shall be so conducted.

5. The costs in this proceeding be and are hereby taxed against the defendants.

Done, this the 23rd day of August, 1976.

/s/ (Illegible)
United States District Judge

APPENDIX C

Stipulation of the Parties
(Exhibit X Omitted)

The parties stipulate that the "Medicare Act", as defined in the complaint, which was relevant and controlling in all of the transactions which are the subject of this litigation was this Medicare Act in the form prior to the amendments effective October 31, 1972, and that none of the provisions contained in these 1972 amendments applied to the transactions in this case.

The parties have previously agreed by stipulation filed November 11, 1975, that:

> "The parties, by and through their attorneys of record, stipulate that this action is properly maintainable and may proceed as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of all affected private non-profit, private proprietary and non-federal governmental hospitals located and operating in the State of Alabama with the exception of Hospital Association of Conecuh County, a corporation d/b/a Conecuh County Hospital; and the parties further stipulate that the named plaintiffs in this action are proper representatives to maintain the aforesaid class action."

The hospital class members are private non-profit, private proprietary and non-federal governmental hospitals operating and located within the State of Alabama. All of these hospitals provided medical services for which they sought reimbursement from defendant Blue Cross, as fiscal intermediary for the Secretary of HEW under the Medicare Act. Following reimbursement, the defendant fiscal intermediary, after fiscal review and audit, determined that there had been an over payment to those class members and in the amounts specified in Exhibit X, be-

cause of over utilization of hospital services by patients in these hospitals. Patient files were reviewed by registered nurse employees of the fiscal intermediary and its medical consultants; and the fiscal intermediary made a unilateral determination of whether the entire hospital stay was or was not reasonable and necessary, or whether part of it was and part of it was not. To the extent that the fiscal intermediary determined that payments, as reimbursement for hospital care, had been made to these class members for hospital services thus determined to be unnecessary, the fiscal intermediary sought repayment of those amounts. As an alternative repayment by these hospitals, defendants asserted the right of recoupment against future requests for reimbursement for future hospital services provided by them.

The essential issue for decision by the Court is whether the procedures utilized by defendants in making these determinations were wrongful and illegal for the reasons asserted by the plaintiffs in the complaint; or were proper as asserted by defendants.[1] Subsumed under this issue are the questions—(a) was there a hearing which comported with constitutional and statutory requirements; and (b) were constitutionally and statutorily adequate standards applied?

In the conduct of fiscal review and audit procedure of the class members shown on Exhibit X, defendants took the position that they could determine unilaterally whether these class members had received medicare reimbursements to which they were not entitled. The defendants, in the course of the retroactive denial of benefits, furnished to these class members the names of those

[1] In view of the holding in *Mt. Sinai Hospital, etc. v. Weinberger, etc.*, 517 F.2d 329 (5th Cir. 1975), the parties assume that this Court is bound thereby to find available to defendants the remedies of recoupment and offset, provided the procedures utilized did not violate the constitutional and statutory rights of the hospital class members.

patients who were deemed to have been unnecessarily treated or to have been the recipients of non-coverage services. Notwithstanding requests by these class members for hearing or review of these adverse determinations of defendants, the determinations were made unilaterally by defendants; defendants did not grant hearings or review procedures in connection with or after adverse determinations of over payment to these class members, and the assertion of the right to recoupment or offset from or against them. Defendants took the position that such unilaterial determinations of over payments, without opportunity for hearing and review, were contemplated under and by the Medicare Act; and, moreover, that there was no provision in the Medicare Act or regulations promulgated thereunder for hearing or review prior to or after an administrative determination of over payment and of a right to recoupment and offset.

On the question of the adequacy of the procedure, plaintiffs assert that a failure to provide a hearing or review, in and of itself, deprives the affected class members of their constitutional and statutory rights as specified in the complaint. Defendants contend that there is no constitutional or statutory infirmity in the procedures which they employed. Plaintiffs, by submission on this stipulation, do not waive their right to contend further that the standards applied by defendants did not meet constitutional and statutory requirements; but feel that it is not necessary for the Court to reach this point in view of their contentions that the absence of hearing or review procedure is infirmity enough to warrant relief. Should the Court find it necessary to reach the question of adequate standards, further testimony will have to be developed.

Defendants have also asserted that the repayments actually made by class members were made voluntarily. The basis of this characterization is contained in the Levine affidavit. Plaintiff class members assert that the repayments were made under duress, and thus not voluntarily, and rely on the affidavits of G. C. Long

and Frank Gittings. Defendants do not dispute the recitations in the Long and Gittings affidavits that repayments were made by class members after threat by defendants to withhold future payments until the alleged over payments had been recouped.

STEINER, CRUM & BAKER
/s/ JOHN P. OLIVER, II
/s/ (Illegible)
Attorneys for Plaintiffs

/s/ KENNETH E. VINES
Attorney for Defendants

Supreme Court, U. S.
FILED
JUN 22 1979
MICHAEL RODAK, JR., CLERK

No. 78-1520

In the Supreme Court of the United States

OCTOBER TERM, 1978

ALABAMA HOSPITAL ASSOCIATION, ET AL.,
PETITIONERS

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1520

ALABAMA HOSPITAL ASSOCIATION, ET AL.,
PETITIONERS

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH,
EDUCATION, AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

Petitioners provide medical services to beneficiaries of the federal Medicare program. They seek review of the judgment of the court of appeals, holding that district courts lack jurisdiction to review reimbursement determinations made by the Secretary of Health, Education, and Welfare under the Medicare Act, 42 U.S.C. 1395 *et seq.*

1. Petitioners represent a class of private and non-federal governmental hospitals in Alabama that provide Medicare services to Medicare patients. These hospitals are entitled to reimbursement for the reasonable cost of performing such services. Respondent Blue Cross is the

"fiscal intermediary" chosen by petitioners to transmit reimbursement payments provided by HEW under the Act (Pet. App. A-1). This dispute arose when Blue Cross conducted an audit of petitioners' files and determined that $657,000 had been paid to petitioners between 1967 and 1972 for services that were medically unnecessary and therefore not covered by the Medicare program. Petitioners were notified of this determination but were not afforded a hearing prior to the final administrative decision to recoup the overcharges.

Thereafter either petitioners repaid the overcharges or Blue Cross withheld payments for future services as a set-off. Petitioners then brought this action seeking return of the $657,000, contending that the failure to afford them an administrative hearing prior to recoupment deprived them of property without due process of law.

2. The district court ruled in petitioners' favor and ordered the Secretary to repay the amounts disallowed by Blue Cross or provide an evidentiary hearing on petitioners' claims within a reasonable time (Pet. App. A-11).

The court of appeals reversed, holding that the district court had no jurisdiction in this case. The court reached this conclusion in reliance on its prior decisions in *Dr. John T. MacDonald Foundation, Inc.* v. *Califano*, 571 F. 2d 328 (5th Cir.) (en banc), cert. denied, No. 78-88 (Oct. 10, 1978), and *American Association of Councils of Medical Staffs of Private Hospitals, Inc.* v. *Califano*, 575 F. 2d 1367 (5th Cir. 1978), cert. denied, No. 78-563 (Jan. 15, 1979). In those cases, the court held that district courts lack jurisdiction to review actions taken by the Secretary under the Medicare Act with respect to pre-1974 services because Section 1872 of the Act, 42 U.S.C. 1395*ii*, incorporates Section 205(h) of the Social Security Act, 42 U.S.C. 405(h), which provides that:

> No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided.

Because no other portion of the Medicare Act provides for judicial review of the Secretary's reimbursement determinations for pre-1974 services, the court of appeals concluded that the district court lacked jurisdiction to review the Secretary's decision in this case.[1] See *Weinberger* v. *Salfi*, 422 U.S. 749, 757 (1975).

Although the district court lacked jurisdiction in this case, the court of appeals noted (Pet. App. A-2 to A-3) that petitioners are not precluded from seeking adjudication of their claims in the Court of Claims. The Court of Claims has held in *Whitecliff, Inc.* v. *United States*, 536 F. 2d 347 (1976), cert. denied, 430 U.S. 969 (1977), that it has jurisdiction to award money damages under 28 U.S.C. 1491 for claims brought under the Medicare Act. The court of appeals therefore transferred the action to the Court of Claims (Pet. App. A-3 to A-4).

3. This petition raises essentially the same issues that were presented in *Dr. John T. MacDonald Foundation, Inc.*, *supra*, and in *American Association of Councils of Medical Staffs of Private Hospitals supra*. For the same reasons that the petitions were denied in these cases,

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[1] The Medical Act was amended as of October 31, 1972, to allow all providers of Medicare services to obtain a hearing and judicial review with respect to any reimbursement determinations made by the fiscal intermediary for accounting periods concluding on or after June 30, 1973. 42 U.S.C. 1395*oo*. The question presented in this petition thus has significance only for controversies that concern reimbursement for Medicare services that were provided prior to June 30, 1973. The parties stipulated that this case does not involve transactions occurring after October 31, 1972 (Pet. App. A-13).

review should be declined in this case as well.[2].

Contrary to petitioners' assertion, the court of appeals did not hold that the Medicare Act "precluded any federal court anywhere from deciding a claim" of this type (Pet. 10). Instead, the court of appeals transferred this case to the Court of Claims, which has concluded in *Whitecliff*, *supra*, that it has jurisdiction under 28 U.S.C. 1491 to award money damages in suits brought under the Medicare Act (Pet. App. A-2 to A-3).[3] Petitioners' contention that the Act is unconstitutional because it totally precludes judicial review of the Secretary's actions therefore is not properly presented in this case.[4] As the court stated in *MacDonald*, *supra*, 571 F. 2d at 332 (emphasis in original):

[2]We are sending petitioners a copy of our briefs in response to the petitions in *MacDonald* and *American Association*.

[3]The United States does not believe that *Whitecliff* was correctly decided. But until that decision is modified or overruled, petitioners' argument that the Act unconstitutionally precludes review of the Secretary's actions is incorrect.

[4]For the same reason, petitioners' claim that mandamus jurisdiction lies in the district court under 28 U.S.C. 1361 is incorrect. Mandamus is an "extraordinary remedy" which may not be invoked unless there is "no other adequate remedy available." *Carter* v. *Seamans*, 411 F. 2d 767, 773 (5th Cir. 1969). An action in the Court of Claims is plainly an adequate remedy in a case such as this, where petitioners seek the return of a definite sum of money. Moreover, the limitations on jurisdiction to review the Secretary's decisions under Section 205(h) of the Social Security Act, as incorporated by Section 1872 of the Medicare Act, apply to mandamus jurisdiction as well as to general federal question jurisdiction. See *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 757. Questions concerning the extent of mandamus jurisdiction were pretermitted in *Califano* v. *Yamasaki*, No. 77-1511, (June 20, 1979), but it is unnecessary to address them in this case because of the availability of jurisdiction in the Court of Claims.

> Happily, we need resolve neither Congress' intent to preclude review of constitutional claims nor the constitutionality of a statute so construed. We would face these issues only if *all* avenues of review were precluded.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JUNE 1979

DOJ-1979-06